No. 15,590

United States Court of Appeals

For the Ninth Circuit

In the Matter of the Application of
WILLIAM J. MCNALLY,
Petitioner, for a Writ of Habeas Corpus.

APPELLEE'S BRIEF.

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APPELLEE'S BRIEF.

STATEMENT OF THE CASE.

On February 14, 1957, McNally filed a petition for writ of habeas corpus in the United States District Court for the Southern District of California, Central Division. (Cl. Tr. 4-32.) On February 15, 1957, the Honorable Leon R. Yankwich, judge of the United States District Court, denied the petition. (Cl. Tr. 33.)

The notice of appeal was filed on February 25, 1957. (Cl. Tr. 43.) On March 1, 1957, petitioner filed in this Court an application for a certificate of probable cause. The certificate of probable cause was granted by Judge Hamlin on March 11, 1957.

STATEMENT OF THE FACTS.

The petition for writ of habeas corpus filed in the United States District Court alleges that the petitioner was denied due process of law. He alleges that the district attorney knowingly used perjured testimony, that petitioner did not have the effective assistance of counsel, and that he was unconstitutionally denied his appeal in the State Court. He likewise alleges numerous other errors in instructions and misconduct on the part of the prosecutor and the judge.

Petitioner was convicted on October 15, 1953, in the Superior Court of the State of California, in and for the County of Los Angeles, of the crime of Grand Theft in action number 156,252 on the files of that Court. Petitioner did not file a timely notice of appeal from that judgment. Petitioner has filed several proceedings in the California State Courts, among them a petition for writ of habeas corpus in the California Supreme Court, Criminal No. 5783 on the records of that Court. Petitioner likewise filed a petition for writ of habeas corpus in the California Supreme Court, No. 5884 on the files of the Clerk of the California Supreme Court. The California Supreme Court denied both of these applications. The California Supreme Court rendered an opinion in action No. 5783 which is reported as *In re McNally,* 46 A.C. 306. In this proceeding the petitioner was represented by counsel. The California Supreme Court denied the application for writ of habeas corpus in action No. 5884 on April 18, 1956. At the time these applications were made in the California Su-

preme Court the following documents were lodged with the Court: 1. The Los Angeles Superior Court files in the case of *People v. McNally,* No. 156,252 in the files of said Superior Court 2. The clerk's transcript in *People v. McNally,* 2 Crim. No. 5357. [The opinion of the District Court of Appeal in that matter is reported in 134 Cal. App. 2d 410.] 3. The reporter's transcript in *People v. Madlung,* 2 Crim. 5142 in the files of the District Court of Appeal, Second District of the State of California, which was Los Angeles Superior Court No. 156,968—[this case was consolidated for trial with the case of *People v. McNally,* Los Angeles Superior Court No. 156,252.]

The files and records which were lodged with the California Supreme Court with those applications reveal the following facts:

On May 21, 1953, the petitioner appeared in Court with his counsel, was arraigned on an information charging grand theft and robbery and made a motion under Section 995 of the Penal Code. (Cl. Tr. p. 4, *People v. McNally,* 2 Crim. 5357.)

On June 8, 1953, the motion was denied and petitioner entered a plea of "Not Guilty". (Cl. Tr. p. 5.)

On August 24, 1953, petitioner, with his counsel, was present in Court for trial and by stipulation of counsel, the matter was consolidated for trial with the case of *People v. Madlung,* Los Angeles Superior Court No. 156,968. (Cl. Tr. p. 6.)

At this time, on motion of the district attorney, the allegation of the prior conviction of McNally of the

crime of burglary was stricken from the record and the district attorney further agreed not to use McNallys prior felony conviction for impeachment in cross-examination. The proceedings at this time are set forth in the reporter's transcript in *People v. Madlung,* 2 Crim. 5142, p. 2, line 3 to p. 3, line 21. (See also Cl. Tr. p. 6, *People v. McNally,* 2 Crim. 5357.)

Following a trial by jury, during which at *all* times the petitioner was represented by counsel (see Rep. Tr. pp. 2-265, *People v. Madlung,* 2 Crim. 5142), verdicts were returned finding petitioner and his co-defendant guilty of grand theft as charged in count 1, and not guilty of robbery as charged in count 2. (Cl. Tr. pp. 7-10, *People v. McNally,* 2 Crim. 5357.) The verdicts were filed August 29, 1953.

Petitioner, through counsel, moved for a new trial which was denied on October 15, 1953, as was his application for probation, and on that date judgment was pronounced and petitioner was sentenced to the State Prison for the term prescribed by law. (Cl. Tr. pp. 11-12, *People v. McNally,* 2 Crim. 5357.)

He was represented by counsel at the time judgment was pronounced. The proceedings at that time are found in the file of *People v. McNally,* Los Angeles Superior Court No. 156,252.

The petitioner at no time prior to the return of the verdict of guilt expressed a desire to discharge his attorney. Following the verdict, and by a letter bearing a date of September 3, 1953 (see file in *People v. McNally,* Los Angeles Superior Court No. 156,252) he

complained that he was "not adequately defended for there was no defense offered. . . ." He also wrote a letter dated September 15, 1953 (see file, *People v. McNally,* Los Angeles Superior Court No. 156,252). These letters preceded the hearing on the motion for new trial and the application for probation.

On October 15, 1953, the defendant, being in open Court with his counsel, expressed no dissatisfaction with his counsel and he did not purport to discharge him. The trial judge made inquiry as to the complaints expressed regarding the representation but the petitioner made no objection to the trial counsel representing him at the hearing on the motion for new trial or on the arraignment for judgment.

APPELLANT'S CONTENTIONS.

I. The petition stated sufficient facts to require a response and the taking of evidence by the District Court.

II. All of the facts stated in the petition and the argument must be considered as true for the purpose of determining if the petition is sufficient.

III. Substantial federal questions were raised by the petition:

A. The petition sufficiently pleaded the denial of the right of effective representation of counsel in violation of due process of law.

B. The petition sufficiently pleaded the knowing use by the prosecution of perjured testimony in violation of due process of law.

C. The petition sufficiently pleaded the denial by the state authorities of petitioner's right to appeal under California law in violation of due process of law.

IV. No other District Court has passed on the questions presented by the instant petition for writ of habeas corpus.

SUMMARY OF APPELLANT'S ARGUMENT.

I. The appeal is moot; petitioner is no longer imprisoned in the Los Angeles County jail and is no longer in the custody of the Los Angeles County sheriff.

II. Petitioner has not exhausted his state remedies within the meaning of 28 U.S.C. 2254.

III. The allegations of the petition are insufficient to state a cause for relief.

ARGUMENT.

I.

THE APPEAL IS MOOT; PETITIONER IS NO LONGER IMPRISONED IN THE LOS ANGELES COUNTY JAIL AND IS NO LONGER IN THE CUSTODY OF THE LOS ANGELES COUNTY SHERIFF.

The petition reflects the fact that petitioner at the time of the filing of the petition in the United States District Court, Southern District of California, Central Division, was confined in the Los Angeles County jail. While so incarcerated he was in the custody and

control of the Los Angeles County sheriff. Since the denial of the petition for writ of habeas corpus petitioner has been transferred to the California State Prison at San Quentin. He is currently in the custody of Warden Dickson of the San Quentin Prison. It thus appears that the present appeal is moot under all the tests used to determine mootness.

This case is moot under the test laid down in the case of *Factor v. Fox,* 175 Fed. 2d 626, (6th Cir. 1949), and similar cases. Under that test an appeal is moot whenever there is no one present within the district responsible for the petitioner's detention who would be an appropriate respondent. There is no longer an appropriate respondent in the Southern District of California, Central Division. Any order the Court made to the sheriff for the production of the petitioner would be a useless order. The sheriff of Los Angeles County no longer has the custody of the petitioner and could not comply with any order of the District Court requiring him to produce the petitioner for a hearing. Indeed, furthermore, the sheriff of Los Angeles County could not require the warden of San Quentin State Prison to produce the prisoner in Los Angeles County. The District Court of the Southern District of California, Central Division, has no jurisdiction over Warden Dickson of the California State Prison at San Quentin. Of course, the jurisdiction of the Court in habeas corpus extends only over the person who has control of the petitioner and not over the State. See *Elliott v. Hendricks*, 213 F. 2d 922.

Furthermore, the appeal is moot under the test of *Pollard v. United States,* 352 U.S. 354 (1957), and

Dickson v. Castle, 244 Fed. 2d 665 (9th Cir., 1957). Under the *Pollard* decision an appeal is not moot where "the possibility of consequences collateral" to the judgment is "sufficiently substantial" to justify the Court in dealing with the merits. The denial of this petition for writ of habeas corpus would have no material effect if this Court found the appeal to be moot. In those circumstances the denial of the writ of habeas corpus would not be a sufficient basis for the future denial of the writ of habeas corpus.

As demonstrated above, it is clear that the reversal of the order of denial would have no material effect, since the District Court would be without jurisdiction to compel a hearing on the issues presented by the petition for writ of habeas corpus.

II.

PETITIONER HAS NOT EXHAUSTED HIS STATE REMEDIES WITHIN THE MEANING OF 28 USC 2254.

Petitioner has not exhausted his state remedies. Neither under California law nor under federal law may a petitioner use a writ of habeas corpus as a substitute for an appeal. See *In re Dixon*, 41 Cal. 2d 756; *Sunal v. Large,* 332 U.S. 174; *Goto v. Lane,* 265 U.S. 393. If petitioner had properly pursued his appeal as allowed by California law he could have presented the questions concerning the consolidations of trial, misconduct in instructions, ineffectve assistance of counsel, the misconduct of the trial Court and prosecution

and the many other questions raised in the present petition. (Had a timely notice of appeal been filed petitioner would have been entitled to a free copy of the transcript of the proceedings in the criminal trial and would have been entitled to pursue his appeal.)

Petitioner alleges that he was unconstitutionally denied his right to appeal in California. Petitioner raised this objection in the proceedings in the State Court. In the California Supreme Court (Criminal No. 5783) petitioner did not allege that any prison official neglected or intentionally acted to prevent petitioner from filing a timely notice of appeal. Petitioner did not adequately plead a constructive filing of notice of appeal and was not entitled to a transcript of the proceedings under California law. Where the failure to file a timely notice of appeal is due to the fault or neglect of state officials the notice is deemed constructively filed. See *People v. Slobodian*, 30 Cal. 2d 362; *People v. Cato,* 136 Cal. App. 2d 503. However, the mere failure of an attorney to comply with the request of a defendant to file a notice of appeal has been repeatedly held insufficient cause for deeming the notice of appeal to be constructively filed. *People v. Dawson,* 98 Cal. App. 2d 517. Thus, it is apparent under California law that petitioner did not adequately allege a constructive filing of a notice of appeal since he failed to allege that any state official prevented the filing of a timely notice of appeal.

The determination of the California Supreme Court on this question as to whether or not petitioner suf-

ficiently alleged a constructive filing of notice of appeal is conclusive.

Petitioner's counsel seek to characterize the allegation concerning *ineffective assistance of counsel* as the equivalent of the *denial of counsel.* This analogy is not accurate. Before "ineffective counsel" results in a denial of due process counsel's conduct of the defense must be of such a low caliber that it reduces the trial to a sham and a farce. It is the theory of the "ineffective counsel" cases that the conduct of the defense counsel in the presence of the Court must be of such a low caliber that the judge is given notice of the ineffective representation and his failure to intercede constitutes state action which results in denial of the due process. Compare *Diggs v. Welch,* 148 F. 2d 667, cert. den. 325 U.S. 889 (D.C. C.A. 1945); *Ex parte Haumesch,* 82 F. 2d 558 (9th Cir. 1936).

It is obvious that such a contention could and should be raised on appeal. See *People v. Hartridge,* 134 C.A. 2d 659. The failure to properly take an appeal and raise the matters of ineffective counsel on appeal constituted failure to exhaust state remedies. This contention has been waived. Indeed, as said in the case of *Brown v. Allen,* 344 U.S. 443 at 503, rights under the federal constitution may be waived at the trial and by failure to assert such errors on appeal. The opinion in *Brown v. Allen, supra,* at 503 states the rule as follows:

> "Of course, nothing we have said suggests that the federal habeas corpus jurisdiction can displace

a state's procedural rule requiring that certain errors be raised on appeal. Normally, rights under the federal constitution may be waived at the trial (citation) and may likewise be waived by failure to assert such error on appeal. (Citation.) When a state insists that a defendant be held to his choice of trial strategy and not be allowed to try a different tack on state habeas corpus he may be deemed to have waived his claim and thus has not right to assert on federal habeas corpus. Such considerations of orderly appellate procedure give rise to the conventional statement that habeas corpus should not do service for an appeal."

Furthermore, petitioner has not exhausted his state remedies, because he has not complied with the California Supreme Court procedural requirements. The California Supreme Court procedural requirements require that all matters be set up at the earliest opportunity. To avoid operation of this rule a petitioner attacking a judgment collaterally must indicate that he had no opportunity at the trial to present the matters alleged. See *In re Razutis,* 35 Cal. 2d 532, 536; *In re Swain,* 34 Cal. 2d 300. It will be noted that the petition, No. 5884 in the California Supreme Court, was filed *two and one-half years after the judgment;* the matters raised in that petition were not raised prior to that date. Thus, petitioner was required to explain the delay and did not do so. Under these circumstances the California Supreme Court may properly deny the petition until petitioner have given an honest and frank explanation of this fact.

Furthermore, petitioner did not adequately plead the facts upon which he relies in the petition filed in the California Supreme Court. See *In re Razutis,* 35 Cal. 2d 532. Petitioner did not allege specifically who connected with the prosecution knew of the alleged perjured testimony. However, the petition filed in the District Court, in the portion labeled "Argument", states that a particular deputy district attorney knowingly and willingly used perjured testimony. Such allegation was not, however, contained in the petition filed in the California Supreme Court.

Until appellant has submitted a petition that conforms to the State procedural requirements, he has not exhausted his state remedies. No exceptional circumstances are alleged to obviate the necessity for exhaustion of state remedies. The petition was, therefore, properly dismissed.

Indeed, it is well settled that there can be no exhaustion of state remedies until there has been submitted a petition that conforms to state procedural requirements. *Buchanan v. O'Brien,* 181 Fed. 2d 601 (1st Cir., 1950); *Willis v. Utecht,* 185 Fed. 2d 810 (8th Cir. 1950; *United States ex rel. Calvin v. Cloudy,* 95 Fed. Supp. 732 (D.C. N. 1951).

III.

THE ALLEGATIONS OF THE PETITION ARE INSUFFICIENT TO STATE A CAUSE FOR RELIEF.

The District Court properly denied the petition since the allegations were too general to state a cause

for relief. The only references in the petition proper were of a general form. Petitioner alleged generally that during the course of the trial a fraud was perpetrated on the petioner by the district attorney, perjured testimony was knowingly used by the district attorney, and "petitioner was denied counsel of his own choice and judgment was rendered without ruling on petitioner's motion for a new trial, at this hearing petitioner had a mere token or *pro forma* appearance of counsel" and "there was a significant lack of competent and capable counsel to protect petitioner's substantial rights".

These allegations are in general form as are all of the other allegations in the petition. Petitioner has failed to state sufficient facts to state a cause for relief. A petitioner is required to state the facts upon which he relies as a basis for relief on habeas corpus. He may not rely on a conclusion of law. This universal rule does not require of the petitioner any compliance with legal technicalities. All such rule requires is an honest and frank statement of the facts upon which he relies. The petition filed in the instant case is typical of the problems created by permitting the pleading of conclusions in habeas corpus petitions. Only the bare conclusion is stated and it is intermixed with much pseudo-legal argument which serves only to confuse and compound the issue. The Court should insist that petitioners frankly state the facts upon which they rely as a basis for relief in a habeas corpus petition. The Court should state that the legal arguments upon which petitioner relies are secondary to an honest statement of the facts.

The proposition that an allegation of law unsupported by any specific fact is insufficient to state a cause for relief is supported by many cases. See *Collins v. McDonald,* 258 U.S. 416, 420-421; *Kohl v. Lehlback,* 160 U.S. 293, 299; *Cuddy, petitioner,* 131 U.S. 280, 286. Also see, *Langer v. Ragen,* 237 F. 2d 827, 7th Cir. 1956; and compare *Price v. Johnson,* 334 U.S. 266, 286-287.

It should be noted that the case of *Price v. Johnson, supra,* although frequently referred to as supporting the proposition that a pleading of a conclusion is sufficient in a habeas corpus case, does not so hold.

Petitioner cannot rely upon the facts intermixed in his legal argument as the basis for his petition.

CONCLUSION.

It is respectfully submitted that the appeal be dismissed and/or the order of denial affirmed.

Dated, San Francisco, California,
October 8, 1957.

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